

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

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13 CHRIS LUSBY TAYLOR, NANCY A.
14 PEPPEL-GONSAVLES, GARY KESSELMAN,
15 SUSAN SWINTON, DAWN E. STRUCK,
16 and WILLIAM J. PALMER, as
taxpayers, and on behalf of
themselves and other persons
similarly situated,

NO. CIV. S-01-2407 WBS GGH

Plaintiffs,

ORDER RE: MOTION TO DISSOLVE
PRELIMINARY INJUNCTION

19 JOHN CHIANG, in his capacity
20 as CONTROLLER OF THE STATE OF
21 CALIFORNIA, and STEVE WESTLY,
individually,

Defendants.

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26 Currently before the court is defendant John Chiang's
27 motion to dissolve the court's preliminary injunction order of
28 June 1, 2007. *Taylor v. Chiang*, Case No. 01-2407, 2007 WL

1 1628050 (E.D. Cal. Jun. 1, 2007).

2 I. Factual and Procedural History

3 Plaintiffs Chris Lusby Taylor, Nancy A. Pepple-
4 Gonsalves, Gary Kesselman, Susan Swinton, Dawn E. Struck, and
5 William J. Palmer ("plaintiffs") filed a complaint on behalf of
6 themselves and other persons similarly situated on December 31,
7 2001, challenging the constitutionality of California's Unclaimed
8 Property Law, California Code of Civil Procedure sections 1300 et
9 seq. ("UPL"). On June 26, 2002, Judge Frank C. Damrell granted
10 defendants' motion to dismiss based on Eleventh Amendment
11 immunity. Plaintiffs appealed that order, and the Ninth Circuit
12 vacated the dismissal and remanded the matter to this court.
13 Taylor v. Westly, 402 F.3d 924 (9th Cir. 2005) (hereinafter
14 referred to as "Taylor I").

15 On June 2, 2005, plaintiffs filed a motion for a
16 temporary restraining order and preliminary injunction, asking
17 this court to enjoin enforcement of the UPL. On June 22, 2005,
18 Judge Damrell recused himself and the matter was reassigned to
19 the undersigned. (June 22, 2005 Order.) On August 16, 2005,
20 this court denied plaintiffs' motion for a preliminary
21 injunction. (Aug. 16, 2005 Order.) Plaintiffs appealed this
22 court's denial to the Ninth Circuit, which, on April 30, 2007,
23 reversed and remanded with instructions to grant a preliminary
24 injunction consistent with its order. See Taylor v. Westly, 488
25 F.3d 1197, 1202 (9th Cir. 2007) (hereinafter referred to as
26 "Taylor II").

27 On June 1, 2007, this court enjoined defendant John
28 Chiang, and his agents and employees from accepting, taking title

1 to, or possessing any property as well as selling, converting, or
2 destroying any property pursuant to the UPL until he "promulgated
3 regulations providing for fair notice to the owner and public,
4 satisfactory to and approved by this court."

5 On August 21, 2007, the California Legislature passed
6 Senate Bill 86. (Ball Decl. Ex. A ("hereinafter S.B. 86").)
7 Because the bill contains an urgency clause and the Legislature
8 passed it by a vote of two-thirds, the bill went into effect
9 immediately when California Governor Arnold Schwarzenegger signed
10 it on August 24, 2007. See Cal. Const., art. IV, § 8(c)(3). On
11 September 5, 2007, defendants filed this motion to dissolve the
12 injunction.¹

13 **II. Discussion**

14 **A. Legal Standard**

15 "To obtain a preliminary injunction, the moving party
16 must demonstrate either (1) probable success on the merits and
17 the possibility of irreparable injury, or (2) that serious
18 questions are raised and the balance of hardships sharply favors
19 the moving party. These are not separate tests, but are the ends
20 of a continuum; the greater the relative hardship to the moving
21 party, the less probability of success must be shown." Nat'l
22 Ctr. for Immigrants Rights, Inc. v. I.N.S., 743 F.2d 1365, 1369
23 (9th Cir. 1984) (internal citations omitted).

24 Once a preliminary injunction is issued, district
25 courts have "wide discretion" to modify it. System Fed'n No. 91
26

27 ¹ This courts June 1, 2007 order allowed the defendants
28 to petition the court to modify the injunction by motion,
pursuant to Local Rule 78-230.

1 Ry. Emp. Dep't v. Wright, 364 U.S. 642, 648 (1961) (holding that
2 a district court has "wide discretion" to modify an injunction
3 upon changed circumstances or new facts); see also Tanner Motor
4 Livery, Ltd. v. Avis, Inc., 316 F.2d 804, 810 (9th Cir. 1963)
5 (same). A district court retains the power to modify a
6 preliminary injunction at any time upon the consideration of new
7 facts. See A&M Records v. Napster, Inc., v. Napster, Inc., 284
8 F.3d 1091, 1098 (9th Cir. 2002) (affirming modification of a
9 preliminary injunction upon the consideration of new facts).

10 B. Adequacy of S.B. 86

11 "An elementary and fundamental requirement of due
12 process in any proceeding which is to be accorded finality is
13 notice reasonably calculated, under all the circumstances, to
14 apprise interested parties of the pendency of the action and
15 afford them an opportunity to present their objections." Millane
16 v. Cent. Hanover Bank & Trust Co., 339 U.S. 306, 314 (1950).
17 In Taylor II, the Ninth Circuit wrote that "'due process requires
18 the government to provide "notice reasonably calculated, under
19 all the circumstances, to apprise [the] interested part[y] of the
20 pendency of the action and afford [him] an opportunity to present
21 [his] objections.'" 488 F.3d at 1201 (quoting Jones v. Flowers,
22 547 U.S. 220, 226 (2006)) (further quotations omitted).

23 Additionally, the Supreme Court has advised lower
24 courts that the standard for what constitutes reasonable notice
25 is both flexible and fact specific. Millane, 339 U.S. at 314-15
26 ("if with due regard for the practicalities and peculiarities of
27 the case these conditions are reasonably met, the constitutional
28 requirements are satisfied"). However, "[t]he means employed

1 must be such as one desirous of actually informing the absentee
2 might reasonably adopt to accomplish it." Id. at 315. Further,
3 "[t]he reasonableness and hence the constitutional validity of
4 any chosen method may be defended on the ground that it is in
5 itself reasonably certain to inform those affected [citations
6 omitted] or, where conditions do not reasonably permit such
7 notice, that the form chosen is not substantially less likely to
8 bring home notice than other of the feasible and customary
9 substitutes." Id.

10 This court's order of June 1, 2007 advised defendants
11 that "[o]nly if the court approves the sufficiency of the new
12 regulations as consistent with Taylor I and Taylor II will the
13 restrictions of this preliminary injunction be modified or
14 withdrawn." The task for the court now is to determine whether
15 S.B. 86 is consistent with Taylor I and Taylor II, and whether
16 its unfettered enforcement would irreparably harm plaintiffs
17 until such time as the court may address the merits of this
18 matter. For the reasons discussed below, the court concludes
19 that S.B. 86, as it is being implemented by the Controller,
20 satisfies the Constitution, and the court will therefore dissolve
21 the June 1, 2007 injunction.

22 Taylor II found that notice to the property owner must
23 "be given before an individual's control of his property is
24 disturbed." 488 F.3d at 1201. Further, the Ninth Circuit firmly
25 rejected the argument that pre-transfer notice by the holder is
26 constitutionally sufficient. S.B. 86 remedies the problems
27 identified in Taylor II by providing actual pre-transfer notice.
28 S.B. 86 mandates that the Controller send direct mail notice

1 either to the address supplied by the Franchise Tax Board if it
2 differs from the one on the holder's report, or to the address
3 given by the holder. S.B. 86, § 2 at 8 (amendments to Cal. Civ.
4 Proc. Code § 1531). This notice must be sent at least 45 days
5 (and 60 days before the deadline for transfer) before the holder
6 can transfer the property to the Controller. Id., §§ 2, 4 at 8,
7 9-10 (amendments to Cal. Civ. Proc. Code §§ 1531, 1532).

8 Moreover, the Controller has committed to continue to
9 maintain a searchable website, which lists unclaimed property by
10 owner's name and address, and which has received more than a
11 billion visits between July 2006 and April 2007. (1st Huarte
12 Decl. in Supp. of Def.'s Mot. ¶ 3.) At oral argument, counsel
13 defendants assured the court that the names are published on the
14 website before any property is transferred to the Controller.²
15 This form of publication satisfies Mullane as what a reasonable
16 person who actually is desirous of providing notice would do to
17 provide notice to those for whom the Controller does not have an
18 address or for whom mail is returned.³ The searchable internet
19 site is every bit as good or even better than the newspaper
20 publication notice California required in the pre-1968 law, which
21 plaintiffs' attorney has conceded provided constitutionally
22 sufficient notice.

23 ² Once property is transferred to the Controller, owners
24 have a minimum of an additional 10-1/2 months to claim it before
25 it is converted to cash and a minimum of 18 months to claim it if
26 it has no apparent commercial value. S.B. 86, §§ 5, 6 at 12-14
(amendments to Cal. Civ. Proc. Code §§ 1563, 1565).

27 ³ Counsel for defendants affirmed at oral argument, and
28 plaintiffs do not contradict, that only about 3% of property
reported by the holders does not have address information of any
sort.

1 In Taylor II, the Ninth Circuit noted that California
2 has not taken "any action to remedy the constitutional problem
3 with its escheat statute" despite having these precise issues
4 addressed in Taylor I and Suever v. Connell, 439 F.3d 1142 (9th
5 Cir. 2006). 488 F.3d 1202. With the enactment of S.B. 86, that
6 is no longer the case. S.B. 86 and the Controller's commitment
7 to provide a searchable website satisfies constitutional due
8 process.

9 Plaintiffs' argument that the Controller should be
10 ordered to promulgate regulations under California's
11 Administrative Procedure Act is not appropriately addressed to
12 this court. Even if plaintiffs were correct that state law
13 requires the Controller to promulgate regulations, the Eleventh
14 Amendment bars this court from ordering state officials to comply
15 with state law. Pennhurst State Sch. & Hosp. v. Halderman, 465
16 U.S. 89, 124-25 (1984); Taylor II, 488 F.3d at 1202.

17 Plaintiffs' complaints regarding the legislation being
18 proposed by Senator Machado, specifically S.B. 919, are
19 premature. The legislature has not yet acted on any proposals.
20 The court must wait until legislation has been enacted before
21 ruling on its constitutionality and considering whether a
22 preliminary injunction would need to be reimposed. Similarly,
23 plaintiffs' allegations that it normally takes years to process a
24 request to return property is contradicted by evidence supplied
25 by the Controller's office. As Robert Huarte declares, the
26 backlog has been greatly reduced and should be eliminated by the
27 end of the year. (2d Huarte Decl. in Supp. of Def.'s Mot. ¶ 4.)
28 Given the Huarte Declaration, plaintiffs' reliance on a 2003

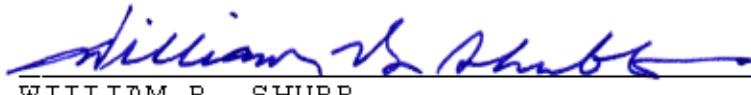
1 State Auditor's report is simply not persuasive evidence as to
2 the current state of the Controller's office.

3 Whenever called upon to enjoin the actions of state
4 officials, this court must be mindful of the basic principles of
5 comity and federalism. See Gomez v. Vernon, 225 F.3d 1118, 1128
6 (9th Cir. 2001) (citing O'Shea v. Littleton, 414 U.S. 488, 499
7 (1974) ("proper balance in the concurrent operation of federal
8 and state courts counsels restraint against the issuance of
9 injunctions against state officers")). California has taken
10 action in response to this court's order. S.B. 86 appears to
11 provide notice reasonably calculated to inform property owners of
12 the impending seizure of their property and significantly lessens
13 the likelihood of irreparable harm to plaintiffs. Moreover,
14 plaintiffs' likely success on a challenge to the
15 constitutionality of S.B. 86 is significantly less than their
16 challenge to the practices of the Controller's office prior to
17 enactment of S.B. 86. Accordingly, the Controller is entitled to
18 have this court's injunction dissolved.

19 IT IS THEREFORE ORDERED that defendant John Chiang's
20 motion to dissolve the court's June 1, 2007 injunction be, and
21 the same hereby is, GRANTED;

22 IT IS FURTHER ORDERED that the court's order of June 1,
23 2007 be, and the same hereby is, VACATED.

24 DATED: October 17, 2007

25 
26 WILLIAM B. SHUBB
27 UNITED STATES DISTRICT JUDGE
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